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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 730

ALBERT BACSKO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Reference to Opinions Below

The petitioner's reference to the opinions below is correct; however, on page 10(a) the citation of the New Jersey Supreme Court as *5* N. J. 49 should read *50* N. J. 49, and all references in the Petitioner's Brief to the *Monmouth* County Court should read *Middlesex* County Court.

Counter-Statement Concerning Jurisdiction

Although conceding that if this Court has jurisdiction, the same is obtained through the provisions of 28 U.S.C.A. 1257(3), it is respectfully submitted that the Supreme Court of New Jersey did not decide any Federal questions of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

Counter-Question Presented

Whether it was error for the Trial Court to refuse to order the State to disclose the name of an informer where the informer was not an active participant to the alleged crime, did not participate in any way therein and where no information emanating from him became part of the State's case.

Counter-Statement of Case

The defendant was indicted by the Middlesex County Grand Jury for bookmaking. Prior to trial, the defendant moved for an order requiring the State to disclose the identity of an informer. Accompanying the motion was an affidavit of the defendant in which he said he owned the Melody Bar in New Brunswick and that he attended A.B.C. hearings on the gambling charges underlying the indictment. He continued to say that Officer Decker of the State Police had testified at the hearing that he had seen gambling at the premises on April 9, 13, 15 and 28 and May 11, 1964 and that he was accompanied by an informer on each occasion. The defendant also said that he knows of his own knowledge that Decker was not at his tavern on those occasions and that the informer was there, alone on some of them. He said he needed the name of the informer to prepare his defense because it was the informer who was present to observe and not Decker, because in fact he, the

defendant, had not taken any bets, because he, the defendant, had been instrumental in exposing a counterfeiter who had threatened revenge, and because the informer could well have some connection with "this episode". Finally, he said he remembered a person who spoke Hungarian in his tavern on the dates alleged by Officer Decker.

The State offered no affidavits on the motion.

It asserted the State's privilege under N.J.S.A. 2A:84-28 to refuse to disclose the identity of an informer. The trial court denied the motion on the basis of the privilege.

At the trial, Officer Decker was the first witness. He testified that he was an Investigator in the State Police assigned as an undercover man in the field of gambling. He testified he first went to the Melody Bar on April 9, 1964 and saw a woman examine the racing section of a newspaper, hand the defendant a slip of paper and two dollars. The defendant pocketed the money and made a telephone call. He then went to the back room. On the same day another patron who was looking at the Armstrong Racing Sheet gave the defendant a slip of paper and two dollars and the defendant went to the back room. On April 13, 1964, Decker again went to the tavern. The same pattern of action was repeated. A patron gave the defendant a slip of paper and two dollars and said to the defendant, "This better wait. The first at Aqueduct looks good." The defendant replied, "They all look good." The defendant took the slip and money and went to the back room.

On April 15, 1964, Decker returned. He saw another similar transaction involving a patron and the defendant. Again on April 28, 1964, the pattern was repeated. Before handing the defendant a slip and money, a woman patron said to a man seated near her, "I like Wild Cargo and Jet Flare in the second at Aqueduct." On May 11,

1964, Decker again saw the same kind of slip-and-money transaction between a patron and the defendant.

Decker testified that he was usually accompanied to the defendant's tavern by a person whom he had met on April 8, 1964, and who speaks some Hungarian. The person took no notes but made some remarks as to what he had seen in the tavern. The person's observations formed no part of the witness's notes, recollection or testimony. He is not a member of the State Police and Decker referred to him as an informer. He didn't know if the informer was paid. The State objected to counsel's question as to the informer's identity, and the objection was sustained. Decker later testified the informer went into the Melody Bar on occasion without him, but he gave Decker no information as to what he saw on those occasions. Nothing Officer Decker testified to was derived from the informer's observations. Some of the things Decker saw were not seen by the informer, and the informer saw some things Decker did not see. Decker reported only what he himself saw.

The next witness was Michael Goch, a State Police Detective. He participated in a raid on the Melody Bar on May 26, 1964. A number of slips and papers current were found on the bar showing numbers of current horse bets. There were tally sheets and horse bettors' newspapers. Unquestionably, the documents found showed a volume of off-track horse betting. State Police Detective Niece also testified he participated in the raid. He testified as to the things found but was not qualified as an expert and so did not testify as to their meaning and contents.

The defense consisted of denials by the defendant, his wife and a few frequenters of the Melody Bar that any bookmaking had taken place there.

After summations and charge the jury retired for thirty-four minutes before returning with its verdict.

ARGUMENT

POINT I

Where an informer plays no part in a criminal event and where the States does not attempt to introduce into evidence anything the informer may have said or seen and where the defense is unable to show that the informer's testimony is necessary for a fair determination of the issues in the case, nondisclosure of the name of the informer in no way violates defendant's rights.

There is no question before this Court as to the constitutionality of the New Jersey Statute, N.J.S. 2A:84A-28, protecting the identity of an informer, nor is there any question as to the purpose or rationale for the existence of the Statute. Rather, the sole issue is whether the facts and circumstances of the present case require disclosure.

This Court has held in *Roviaro* v. *United States*, 353 U. S. 53, 77 S. Ct. 623, 1 L. ed. 2d 639 (1957):

> "We believe no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."

In that case the informer was not only an active participant in the alleged crime but had helped set up the occurrence thereof and, due to the nature of the crime, was the only person who could testify as to some of the elements of the crime necessary for a conviction or an acquittal. Fur-

thermore, when confronted with the defendant he denied any knowledge of him. Also, a possible entrapment situation may have been developed by his testimony.

A comparison of the circumstances in the present case with those in *Roviaro* reveals that patent dissimilarities exist in far greater abundance than the similarities between the two cases. Here, the informer merely observed and did not in any way participate, nor did any information from the informer become part of the State's case. The crime here in question is bookmaking and there was no testimony that any of the State's witnesses or the informer ever placed or attempted to place a bet with the defendant. No element of the crime or any defense thereto was dependent upon the testimony of the informer. Additionally, physical evidence was introduced through other State witnesses to show the nature and extent of the illegal operation and of off-track betting conditions at defendant's establishment.

Petitioner cites no case for the proposition that merely because the informer was present at some of the occasions when the commission of the crime took place, his name must be revealed, although that appears to be the gist and substances of his argument. Nor may the suppositious eventuality of the informer's conjectured possible contradiction of the State's witness' testimony be the alleged grounds for disclosure. *Rugendorf* v. *United States*, 376 U. S. 528, 84 S. Ct. 825, 11 L. ed. 2d 887 (1964); *McCray* v. *State of Illinois*, —— U. S. ——, 87 S. Ct. ——, 18 L. ed. 2d 62 (1967).

POINT II

Defendant has no right of confrontation with an informer whose identity is protected by statute.

Petitioner in Point IV of his Brief alludes to his right of confrontation with the "unidentified witness" under the Sixth Amendment applicable to the States through the Fourteenth Amendment. If by this, petitioner is claiming that the State violated the Sixth Amendment by not producing the informer to testify against the Petitioner and to be cross-examined by him, this Court has had occasion recently to pass upon the identical question. In *Cooper* v. *State of California*, —— U. S. ——, 87 S. Ct. ——, 17 L. ed. 2d 730, 734, Note 2 (1967) it is stated:

> "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit."

See also *McCray* v. *State of Illinois, supra.*

CONCLUSION

It is respectfully urged that no substantial Federal question meriting review by this Court has been submitted in light of the fact that the decision of the New Jersey Supreme Court is in full accord with the decisions of this Court and, accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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